



ADMINISTRATIVE POLICY

STATE OF WASHINGTON DEPARTMENT OF LABOR AND INDUSTRIES EMPLOYMENT STANDARDS

TITLE:	EXEMPTION FROM MINIMUM WAGE AND OVERTIME REQUIREMENTS FOR OUTSIDE SALES POSITIONS	NUMBER: ES.A.9.7 ISSUED: 6/24/2005
CHAPTER:	RCW.49.46.010(5)(c) , RCW 49.46.130(2)(a) , WAC 296-128-540	SEE ALSO: ES.A.9.2 - 6 ES.A.9.8 , ES.A.8.1 ES.A.8.2 , ES.A.9.1 , ES.A.10.1 , ES.A.10.2 , and ES.A.10.3

ADMINISTRATIVE POLICY DISCLAIMER

This policy is designed to provide general information in regard to the current opinions of the Department of Labor & Industries on the subject matter covered. This policy is intended as a guide in the interpretation and application of the relevant statutes, regulations, and policies, and may not be applicable to all situations. This policy does not replace applicable RCW or WAC standards. If additional clarification is required, the Program Manager for Employment Standards should be consulted.

This document is effective as of the date of print and supersedes all previous interpretations and guidelines. Changes may occur after the date of print due to subsequent legislation, administrative rule, or judicial proceedings. The user is encouraged to notify the Program Manager to provide or receive updated information. This document will remain in effect until rescinded, modified, or withdrawn by the Director or his or her designee.

OUTSIDE SALESPERSON ([WAC 296-128-540](#))

1. On August 23, 2004, the U.S. Department of Labor published revised regulations for the "white collar" overtime exemptions, including executive, administrative, professional, and outside sales positions. The State regulation on the outside sales job classification has not changed. The federal changes, and existing state regulations, affect *white-collar employees only (executive, administrative, professional, outside sales)*.

Employers must comply with both state and federal overtime regulations. Where differences exist between Washington State and new federal overtime regulations, an employer must follow the regulation that is most favorable to the worker. The following chart is designed to provide a summarized analysis of both state and federal regulations for the outside sales exemption. Greater details of the state outside sales exemption follow this chart. For more specific information on federal regulations, check with the U.S. Department of Labor at their toll free # 1-866-487-9243 or their website @ <http://www.dol.gov/esa/regs/compliance/whd/fairpay/main.htm> or with a qualified consultant, to determine how changes in federal overtime requirements affect the specific circumstances.

Requirements under state regulations	Requirements under federal regulations	Differences between state and federal regulations
<p>Must meet all parts of the four-part test in the state regulation:</p> <ol style="list-style-type: none"> 1) The employee is engaged in outside sales away from the employer's place of business 2) Payment of a <i>guaranteed</i> salary, commission, or fee payment (or combination); 3) The outside sales person controls his/her total hours worked; 4) No more than 20% inside office work not related to outside sales duties may be performed per workweek. 	<p>Must meet all parts of this two-part test in the federal regulation:</p> <ol style="list-style-type: none"> 1) Is customarily and regularly engaged away from his/her employer's place or places of business; 2) Primary duty must be making sales or obtaining orders or contracts for services for the use of facilities for which a consideration will be paid by the client or customer. 	<ol style="list-style-type: none"> 1) State requires payment on a guaranteed salary, commission, or fee basis (or combination) 2) that outside sales employees control their total hours worked and 3) that no more than 20% of the workweek can be for the same work performed by nonexempt employees

The new federal regulations provide that executive, administrative, professional, and outside sales workers are also exempt from overtime pay if they are earning more than \$100,000 per year as long as they perform at least one duty in an executive, administrative, professional or outside sales job. State regulations contain no similar provision. Outside Sales workers must meet all of the state requirements for the exemption to apply.

2. Reliance On Pre-August 23, 2004 Federal Interpretation. Prior to August 23, 2004, state and federal "white collar" exempt regulations had many identical parts. On August 23, 2004, substantial changes were made to the federal regulations. The Department relies on the interpretations of the pre-August 23, 2004 regulations where identical.

3. Outside Salespersons Are Exempt. Employees who meet the definition of outside salesperson are exempt from the minimum wage act and from overtime.

Outside salespersons are those who customarily work away from the employer's business, and regulate their own hours where the employer has no control over the total number of hours worked, and are advised by the employer that they are an outside sales worker, and are paid on a guaranteed salary, commission, or fee basis, or combination of such payments. There is no "short test" in [WAC 296-128-540](#), Outside Sales. All of the conditions within the regulation must be met for the exemption to apply.

4. Outside Sales Activities. An outside salesperson is someone who is customarily and regularly engaged in the following alternative activities:

4.1 Making Sales. This includes sales, exchanges, contracts to sell, consignments for sale and shipments for sale or other disposition, or

4.2 Obtaining Orders or Contracts for Services or for the Use of Facilities. This means obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer. Examples include: selling of time on the radio, the solicitation of advertising for newspapers and other periodicals and the solicitation of freight for railroads or other transportation agencies. This category also includes employees who sell or take orders for a service that is performed for the customer by someone other than the person taking the order. This does not include service technicians even though they may sell the service that they themselves perform. This type of sale would be incidental to the employee's main job to perform the service required, or

4.3 Demonstrating Products or Equipment for Sale: The outside sales exemption applies to the activity of demonstrating products or equipment for sale, or

4.4 Selling and Performing Services Sold When the Employee is Paid on Commission: Those who sell services that they themselves perform are exempt only when the employee is paid on a commission basis. Employees paid on a salary or fee basis only do not qualify under this activity.

All other conditions of the outside sales exemption must also be met in addition to those in section 3. This means employees performing any of these activities must also be engaged away from the employer's place of business, regulate their own hours worked, where the employer has no control over the total number of hours worked, and payment of a guaranteed salary, commission, or fee basis, or combination thereof and other requirements in sections 3 and 4.

5. Percentage of Time Required to be Spent on One of the Above Types of Outside Sales Duties in Order to Claim Exemption ([WAC 296-128-540 \(2\)](#)). Hours of work by an outside salesperson of a nature that are not described in outside sales activities cannot exceed 20 percent of the hours worked in the workweek by nonexempt employees of their employer. For example, if the nonexempt employees work a 40-hour week selling the employer's products only at the employer's location, then the outside sales employees could not work more than eight hours in duties that are not part of or incidental to and in conjunction with their outside sales activities.

6. Work Performed Incidental to and in Conjunction With Qualifying Outside Sales Work. This is work that is performed by the outside sales employees in furtherance of their own outside sales and solicitations. This includes incidental deliveries and collections. Other examples include: writing of sales reports, revision of catalog or other promotional materials, planning of itinerary and attendance at sales conferences. Incidental activities include loading the truck with the goods to be sold by the driver salesman, driving the truck, delivering the products sold, removing empty containers for return to the employer, and collecting payment for the goods delivered.

Work performed incidental to and in conjunction with outside sales work is considered exempt work and does not count toward the 20% of non-sales work allowed by the exemption.

7. Away From the Employer's Place of Business. Outside salespersons customarily and regularly perform duties away from their employer's place of business, as well as on the premises when their duties coincide with their outside sales work. Inside sales and other inside

work is nonexempt, except such as is directly in conjunction with and incidental to outside sales and solicitations as addressed in section 4.

Characteristically the outside salesperson is one who makes sales at the customer's place of business. This is the reverse of sales made by mail or telephone at the employer's premises, which is not outside sales work. Any fixed site, whether home or office, used by a salesperson as a headquarters or for telephone solicitation of sales must be construed as one of the employer's places of business, even though the employer is not in any formal sense the owner or tenant of the property. An outside salesperson does not lose the exemption by displaying samples in hotel sample rooms when traveling from city to city and these sample rooms should not be considered as the employer's places of business.

8. Employee Must Be Free to Regulate Own Hours. Outside sales employees must be free to regulate their own hours and to set their own work time. The time spent is totally at the employee's discretion and an employer of outside salespeople has no control over the total number of hours worked by the employees.

9. Employer Must Advise of Outside Sales Status. Merely advising a person that he/she is an outside salesperson does not establish exempt status. The individual must be specifically advised that the outside sales position is an overtime-exempt job. The duties must qualify as outside sales or work performed incidental to and in conjunction with outside sales work.

10. Outside Salespersons Must Be Compensated With Guaranteed Salary, Fee Basis, or Commission. In order to qualify for the outside sales exemption, the employee must be paid with a guaranteed salary, commission, or fee basis. The wage agreement may include combinations of these methods of payments. There is no dollar amount established for the guaranteed salary or fee basis, and there is no percentage or dollar amount established for the commission payment. The amount of compensation is based primarily on the volume of sales attributable to their efforts. Payment on an hourly or hourly-plus-commission basis does not meet this requirement.

11. Sales Trainees Not Exempt. Trainees not actually performing the duties of Outside Sales are not exempt. They may be attending training classes or seminars, or participating in practice sessions learning the company's products and policies, which is not exempt work. However, when trainees accompany an experienced outside salesperson while actually making sales, and they make the various sales jointly and both normally receive a commission, the trainee would be considered to be an outside salesperson. Both are engaged in making sales and both are exempt. If the trainee merely accompanies an outside salesperson to help transport goods or samples but is not directly involved in the sale, it is not outside sales work. An outside salesperson that is training a new employee is not engaged in exempt work other than as described in this section.

12. Driver Sales. Drivers may be considered as outside sales if they deliver as well as sell the products. It must be determined whether such an employee is really employed for the purpose of making sales rather than for the service and delivery duties that are performed. The driver sales employee's chief duty or primary function must be the making of sales or the taking of orders to qualify under this definition. The driver sales employee must be a salesperson by occupation, and if so, all work performed which is actually incidental to and in conjunction with the sales effort is exempt work. All other work of such an employee is nonexempt work. A determination of the driver sales employee's chief duty or primary function must be made in terms of the basic character of the job as a whole and not on its title or designation or the kind

of business in which the employer is engaged. The time devoted to the various duties is an important, but not necessarily controlling, element.

A determination of whether the drivers are actually employed for the purpose of, are customarily and regularly engaged in, and have as their chief duty and primary function the making of sales, may involve consideration of such factors as a comparison of their duties with those of other employees engaged as truck drivers and salespersons; the possession of a sales or solicitor's license when such license is required by law or ordinances; presence or absence of customary or contractual prearrangements concerning amounts of products to be delivered; description of the driver's occupation in union contracts; the employer's specifications as to qualifications for hiring; sales training; attendance at sales conferences; method of payment; proportion of earnings directly attributable to sales effort; and other factors that may have a bearing on the relationship to sales of the employee's work. However, where it is clear that an employee performs more than 20% nonexempt work, the employee would be nonexempt in any event and consideration of such factors would not be pertinent.

The following examples will further illustrate the factual situations in which, under the principles discussed previously in this section, route drivers engaged in recurrent deliveries of goods may qualify or may fail to qualify for exemption as outside salespersons.

Exempt Activity	Explanation
<ul style="list-style-type: none"> • A route driver is exempt who provides the only sales contact between the employer and the customers, who calls on customers and takes orders for products that the driver delivers from stock carried in a vehicle, or procures and delivers to the customer on a later trip, and who receives compensation commensurate with the volume of products sold. • Route drivers are making sales when they actually obtain or solicit, at the stops on their routes, orders for their employer's products from persons who have authority to commit to make the purchases. This includes route drivers who call on new prospects for customers along their routes and attempt to convince them of the desirability of accepting regular delivery of goods. • Driver sales employees calling on established customers on their routes, carrying an assortment of the articles which his employer sells, may be making sales by persuading regular customers to accept delivery of increased amounts of goods or of new products, even though the initial sale or agreement for delivery of the employer's products may have been made by someone else. • Retail route drivers who regularly call on established retail customers to deliver goods of generally prearranged amounts and kinds may also exert considerable effort not only to keep such customers satisfied to continue their orders for such goods but also to make such customers aware of other products that the drivers would like to sell them. 	<p>In the six activities in this section, the driver is selling and delivering the products and the duties meet the driver sales requirements.</p> <p>Route drivers who engage in this sales work are in practical effect the employer's exclusive sales contact with such customers, and their earnings are in large part directly attributable to sales made to such customers.</p>

<p>The drivers may offer to take orders for such products or for increased amounts of the products that the driver is already delivering to the customer.</p>	
<ul style="list-style-type: none"> • Route drivers whose regular calls on established customers involve not only delivery of prearranged items but also active efforts to persuade such customers to continue or increase their orders for such goods and to solicit their orders for other kinds of products which the driver offers for sale, who also calls on retail stores which are prospective customers, • Retail route drivers who regularly call on established retail customers to deliver goods of generally prearranged amounts and kinds may also exert considerable effort not only to keep such customers satisfied to continue their orders for such goods but also to make such customers aware of other products which the drivers would like to sell to them. The drivers may offer to take orders for such products or for increased amounts of the products that the driver is already delivering to the customer. 	<p>All of the activities in this section do meet the driver sales requirements as exempt work.</p> <p>The activities listed in the following "Nonexempt Activity" section do not meet the driver sales requirements as exempt work.</p>
Nonexempt Activity	Explanation
<ul style="list-style-type: none"> • Route drivers are not engaged in outside sales work when they call on retail stores that are among the employer's established customers when the delivered goods are of kinds and in amounts that are generally prearranged. • Route drivers are not engaged in outside sales work when they deliver goods to branch business establishments whose personnel have no authority to place orders or make commitments with respect to the kinds and amounts of such goods, and if the kinds and amounts of goods delivered are not determined pursuant to orders placed by the authorized personnel of the customer's enterprise as a result of sales solicitation by the route driver. 	<p>The five activities in this section do not meet the driver sales requirements. Making recurring deliveries, the amounts of which are determined by the volume of sales by the customer rather than by any sales effort of the driver, do not qualify the driver as an outside salesperson nor are such deliveries and the work incident to the making or soliciting of sales by the driver to be considered exempt work.</p>

Nonexempt Activity	Explanation
Route drivers who deliver to supermarkets after the enterprise has been persuaded, by a sales person of the route driver's employer, to accept delivery of goods, and whose functions other than such deliveries are primarily to arrange merchandise, rotate stocks, place point-of-sale and other advertising materials, and engage in other activities which are intended to promote sales by the supermarkets of the goods delivered.	These activities do not meet the driver sales requirements. The drivers are employed primarily to deliver goods and to perform activities in the supermarkets of a nature usually performed by store employees not employed in sales.
Some employees are engaged in a combination of activities involving the selling of services, and the performance of the services. For example, some drivers call on customers for the purpose of selling pesticides and, if a sale is consummated, applying the pesticides on the customer's property.	These activities do not meet the driver sales requirements. Selling the service is incidental to servicing the product for the customer; in this example the application of the pesticides is the service performed.
A route driver whose chief duty is to transport products sold by the employer through vending machines and to keep such machines stocked, in good operating condition, and in good locations.	This activity does not meet the driver sales requirements. That employee is employed for purposes which, although important to the promotion of sales to customers using the machines, do not characterize the employee as a salesperson by occupation.